IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 19TH MARCH 2007 / 28TH PHALGUNA 1928

CRL.A.No. 395 of 2002()

SC.335/2001 of ADDL. SESSIONS JUDGE FAST TRACK COURT-II (ADHOC), THRISSUR

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APPELLANT: ACCUSED NO.1

SINOY S/O.CHAKKALAKAL DEVASSY,
OLLUR DESOM,EDAKKUNNATH VILLAGE,THRISSUR DISTRICT

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT: COMPLAINANT

STATE OF KERALA,REPRESENTRED BY
PUBLIC PROSECUTOR,HIGH COURT OF KERALA,ERNAKULAM

BY PUBLIC PROSECUTOR SRI. M.S. BREEZE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO. 395 OF 2002

Dated this the 19th day of March, 2007.

JUDGMENT

The appellant, who is the 1st accused in S.C.No.335/2001 on the file of the Additional Sessions judge, Fast Track Court-II (Adhoc) Trichur, faced trial along with the 2nd accused for the offence punishable under Section 55(a) read with Section 55(1) of the Abkari Act. The prosecution allegation against the appellant and the other accused briefly is as follows:

2. On 1.3.1998 when PW1, the Excise inspector, along with PW4 and the other officials were on patrol duty and when the excise party reached near the Chapal of Angel Raphael, Ollur, at about 5.45 p.m., they found that the appellant was wrapping a bottle with a piece of paper behind the Chapal and when the excise party reached the spot, it was seen that the appellant was having in his possession 22 bottles of illicit foreign liquor kept for sale without having any permit or licence under the provisions of the Abkari Act. On questioning the appellant, it was revealed that the entire bottles of illicit arrack were given to the appellant for selling by the 2nd accused. Thereafter, PW1 had prepared Ext.P1 mahazar

and seized the entire bottles contained in the plastic bag kept by the appellant and one of the bottles was taken as sample on finding that the bottle contained illicit coloured arrack. After preparing Ext.P2 arrest memo, the appellant was arrested and thereafter the bottles seized from the appellant and the sample bottle taken from the appellant were produced before the excise office along with the appellant. Subsequently, the case was further investigated and final charge was laid against the appellant and the 2nd accused. To prove the case against the appellant and the 2nd accused, the prosecution examined Pws 1 to 6 and produced Exts.P1 to P5. MOs 1 to 4 were also produced. After closing of the prosecution evidence, the accused were questioned under Section 313 of the Code of Criminal Procedure. The appellant and the other accused totally denied all the incriminating circumstances brought against them. No evidence was adduced , either oral or documentary, by the appellant and the other accused before the court. Relying on the evidence adduced by the prosecution, the trial court found the appellant guilty under Section 55(a) read with Section 55(1) of the Abkari Act and the appellant was convicted thereunder and sentenced to undergo S.I for one year and a fine of Rs.One lakh with a default sentence of

fine, to undergo S.I for six months. The trial court also found that the 2nd accused was not guilty of the charge and he was acquitted. Against the conviction and sentence passed against the appellant, this appeal is filed.

3. This Court heard the learned counsel appearing for the appellant as well as the Public Prosecutor. Three questions are raised before this Court challenging the judgment of the trial court. Firstly, it is contended that the reliance placed by the trial court on the evidence of the excise officials to find the appellant guilty of the charge is sustainable as Pws 2 and 5 turned hostile to the prosecution and they are not supporting the prosecution case at all. Secondly, it is contended that the prosecution has not succeeded by adducing cogent and legal evidence to prove that the contraband article seized from the appellant was illicit arrack as there was no evidence before the court to prove that PW1 had taken sample from all the bottles seized. Thirdly, it is contended that even if the entire evidence is accepted, the appellant could not have been found guilty of the offence punishable under Section 55 (a) of the Abkari Act in the light of the judgments of this Court reported in **Surendran v. Excise Inspector** (2004 (1) KLT 404)

and **Sudephan @ Aniyan v. State of Kerala** (2005(2) KLD (Crl) 631) as the prosecution failed to prove that the appellant was found in possession of the contraband in connection with import, export transport or transist of illicit liquor as contemplated under Section 55(a) of the Abkari Act.

4. The entire prosecution case rests on the evidence of Pws 1 and 4. Though the prosecution examined Pws 2 and 5 as independent witness to speak about the seizure, sampling, sealing and labeling of the bottles and the sample bottle from the appellant, they turned hostile to the prosecution. Pws 1,3,4 and 6 are excise officials out of whom PW1 was the Excise Inspector, who detected the offence. According to him, himself, PW4 and other excise officials were on patrol duty on the day of the incident, and when they reached near the Chapal of Angel Raphel, Ollur, they had seen the appellant covering one bottle with a paper and when they reached at the place it was seen that the appellant was in possession of 21 bottles of coloured arrack kept inside a black bag and on questioning him, it was revealed that the bottles were entrusted to him by the 2nd accused for sale. On questioning further, it was revealed that the appellant was not having any

licence or permit to possess the contraband. This witness, further, had stated that the entire bottles were seized from the appellant and on further enquiry it was revealed that the appellant was in possession of Rs.1,002/= with different denominations and they were also seized by PW1. PW1 had further stated that on preparing Ext.P1 mahazar in the presence of the independent witnesses and Ext.P2 arrest memo, the appellant was arrested and the bottles were seized and produced before the Excise Range Office and the case was subsequently investigated by PW6, the Excise Inspector. PW4 is the Excise Preventive Officer, who accompanied PW1 and had given evidence in corroboration with the evidence of PW1 regarding detection of the crime, taking of the sample and arrest of the appellant. PW6 is the Excise Inspector, who had completed the investigation and got Ext.P4 chemical report on analysing the sample and he had stated before the court that as per Ext.P4 chemical report, the sample analysed contained ethyle alcohol of 36.59% by volume. This witness has further stated that bottles seized and the sample were produced before the court as per the thondi list. On production of the sample as well as the other bottles, the court ordered to keep the bottles in the excise office to produce the same before the court as and when required.

However, the sample was kept in the court for sending the same for chemical analysis. On considering the entire evidence, the trial court came to the conclusion that the prosecution had proved the case against the appellant as alleged.

5. The question to be decided in this appeal in the light of the contentions raised by the counsel appearing for the appellant is that whether the judgment of the trial court is sustainable or not. The first contention of the learned counsel appearing for the appellant is that as the independent witnesses turned hostile to the prosecution, it is not proper to believe the evidence of Pws 1,3 and 4. It has come out in evidence that when Pws 1, 4 and other excise officials were on patrol duty on the fateful day and when they reached at the spot, they have found that the appellant was in possession of the contraband articles and they seized MOs 1 to 3. PW1 had taken one of the bottles of arrack as sample for the purpose of analysis and as per Ext.P4 chemical report, it was reported that the sample analysed contained ethyl alcohol. Hence, the trial court was fully justified in believing the evidence of Pws 1 4 and 6 to come to a conclusion that MO1 series were seized from the appellant as alleged by the prosecution. Even though Pws 2 and

5 turned hostile to the prosecution, they admit their signatures in Exts.P1 and P2. Hence, the contention of the learned counsel is answered accordingly. The 2nd contention of the counsel is that there is no proof before the court to show that the entire bottles seized from the appellant contained illicit arrack as alleged by the prosecution as there was no evidence before the court that PW1 had taken homogeneous sample from all the bottles. It has come out in evidence that PW1 had though seized 21 bottles from the possession of the appellant, only one bottle was taken as sample and subsequently it was analysed and as per Ext.P4 report it was seen that the sample contained ethyl alcohol. But, as per the evidence of Pws 1 and 4 it could be seen that the bottle seized from the appellant contained only 375 ml liquor out of which the sample got analysed and at the same time Pws 1 and 4 had admitted before the court that the entire bottles were differently labeled and of different brands. Hence, there was no evidence before the court to show that the entire bottles contained the same liquor from which sample was taken and got analysed by the prosecution. In this contest, the learned counsel placed reliance on a judgment of this Court reported in **Krishnankutty v. State of Kerala** (2005(1) KLT 568) and an unreported judgment of this Court in

Crl.A.No.356/2002. This Court is not inclined to accept the proposition made in the above judgment. However, it is clear from the evidence of Pws 1 and 4 that neither all the bottles were uniformally labeled nor were they of same brand. Specific questions were put to Pws 1 and 4 regarding this, for which PW1 had stated that :

PW4 had stated that:

From this evidence, it is clear that 21 bottles alleged to have been seized from the appellant are different brands and not having any uniform label or seal. In the above circumstances, it is the duty of the prosecution to prove that the entire bottles seized from the appellant contained coloured arrack which contained ethyl alcohol. The evidence adduced before the court would prove that the sample analysed by chemical analyst contained alcohol and that too taken from one bottle which contained only 375 ml. As per Rule 11 of the Foreign Liquor Rules a person is permitted to possess 1.5 liters of liquor without permit or licence under the provisions of the Act and Rules. Hence, the prosecution has not proved that the entire bottles of liquor alleged to have been seized from the appellant is either illicit arrack or illicit liquor. The prosecution had failed to prove that the appellant was in possession of the contraband liquor above the permissible limit. On this ground alone the judgment of the trial court has to be set aside. With regard to the third contention raised by the learned counsel for the appellant, the prosecution had not proved that the appellant was found in possession of the illicit liquor in connection with import, export transport or transist of liquor as contemplated under Section 55(a) of the Act. This question was considered by a Bench of this Court in

Surendran's case (cited supra) and this Court held that it is duty of the prosecution to prove that the accused was found in possession of illicit liquor in connection with transport or transist of illicit liquor in contravention of the provisions of the Act. As per the principles laid down by this Court in **Sudhepan's case** to prove an offence under Section 55(a) of the Abkari Act, the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transist of liquor. As per the charge framed against the appellant there is no such charge against the appellant or it was proved that the appellant was not found in possession of the contraband article as alleged in connection with any of the process as mentioned in Section 55 (a) of the Abkari Act. But, the learned Public Prosecutor submits that as the appellant was found in possession of the illicit liquor without any licence or permit, the appellant can be punished under Section 58 of the Act. Section 58 of the Abkari Act contemplates an offence for possession of illicit liquor. Section 58 reads as follows:

> "Whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing (the duty, tax or rental payable under this Act) not to have been paid therefor, (shall be

> punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh)".

A reading of the above section would clearly show that any person was found in possession of any quantity of liquor or any of the intoxicating drug knowing the same to have been unlawfully imported, transported or manufactured or knowing that the duty, tax or rent under this Act has not been paid, then only that person can be punished under the above section. In this context, it has to be noted that the prosecution has no case before the court that the sample bottle seized from the appellant was illicitly transported or imported or even it was illicit liquor. Ext.P4 certificate would show that the sample contained alcohol alleged to have been that of illicit liquor. But there is no proof for the arrack found in possession of the appellant was illicitly transported. At the same time, it is suggested to PW1 that the bottle contained the label of KSBC and a specific question was also put to PW1 that whether any investigation has been conducted on that? The answer was negative. From the above circumstance, this Court is of the view that the appellant is entitled for the benefit of doubt on this aspect also.

In the light of the discussions made and the principles laid down by this Court, the judgment of the trial court has to be set aside. Accordingly, the appeal is allowed. The judgment of the trial court is set aside and the appellant is acquitted. Therefore, the appellant/accused is set free and his bail bonds are stand cancelled.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO. 395 OF2002A

JUDGMENT

19th March, 2007.